

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 94-60-P-H
)	(Civil No. 96-139-P-H)
WILLIAM H. CARVELL,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

William H. Carvell moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Carvell was convicted of manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). His motion alleges ineffective assistance of counsel because his attorney did not argue before the trial court that section 841 was unconstitutional as applied to him in light of the Supreme Court’s decision in *United States v. Lopez*, 115 S.Ct. 1624 (1995).

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Carvell’s allegations are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

Carvell does not take issue with the underlying facts as recited by the First Circuit in

connection with his direct appeal in *United States v. Carvell*, 74 F.3d 8 (1st Cir. 1996). Carvell was arrested in 1994 after law enforcement officials raided his farm and found 467 marijuana plants, a bottle containing marijuana seeds, growing supplies, smoking paraphernalia and some more marijuana in his barn. *Id.* at 9. He ultimately entered a plea of guilty, and testified at his sentencing hearing before this court that the only reason he grew and used marijuana was for his own use, “to keep from being suicidal.” *Id.* at 9, 10. The court found this testimony to be credible, but concluded it could not grant a downward departure for “lesser harms” that it regarded as appropriate pursuant to section 5K2.11 of the Sentencing Guidelines, in light of a provision elsewhere in the Guidelines prohibiting downward departures for drug dependence or abuse. *Id.* at 10-11. The Court of Appeals concluded this was an erroneous interpretation of the Guidelines, determined that a “lesser harms” downward departure was permissible in these circumstances, vacated Carvell’s sentence and directed that he be sentenced to the mandatory minimum of 60 months. *Id.* at 11, 14. Significantly for present purposes, the First Circuit also declined to address, because it was raised for the first time on appeal, Carvell’s contention that the marijuana manufacturing statute as applied to him was unconstitutional in light of *Lopez*. *Id.* at 14.

II. Discussion

To demonstrate that counsel’s assistance was so ineffective as to require reversal of a criminal conviction, the defendant must make two showings:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes

both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (*Strickland* test applies to cases resolved by guilty plea rather than trial). Carvell contends that the outcome-determinative deficiency in his counsel's performance was the failure to make an argument before the trial court that Congress lacks the authority to sanction the growing of marijuana that is intended solely for the grower's personal use and not for placement in interstate commerce.

The government's response is a straightforward one. Its position is that the requisite prejudice is lacking because there is no constitutional infirmity in the statute under which Carvell was prosecuted, notwithstanding the *Lopez* decision and its warning that federal power exercised pursuant to the Commerce Clause is subject to "outer limits" that have already been defined. *Lopez*, 115 S.Ct. at 1628.

Lopez was decided on April 26, 1995, *Lopez*, 115 S.Ct. at 1624, some four months after Carvell entered his guilty plea and exactly a month before his sentencing hearing. The Supreme Court determined that Congress had exceeded its authority to regulate under the Commerce Clause of the Constitution when it enacted the Gun-Free School Zones Act of 1990 ("Gun Act"), which made it unlawful for an individual to possess a firearm in or on or within 1,000 feet of the grounds of a school. *Id.* at 1626 and n.1. The Court so held because the Gun Act "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," and because the statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1630-31.

I am compelled to agree with the government that neither *Lopez* nor any of the jurisprudence that has developed around the Commerce Clause suggests that section 841 is unconstitutional. This court has already upheld section 841 on this ground, *United States v. Smith*, 920 F. Supp. 245, 247 (D. Me. 1996), as has the First Circuit, *United States v. Lerebours*, 87 F.3d 582, 585 (1st Cir. 1996), *petition for cert. filed*, (U.S. Sep. 23, 1996) (No. 96-6075). Indeed, to my knowledge every other circuit court that has considered the question has determined that no such constitutional infirmity exists. *See, e.g., United States v. Edwards*, 1996 WL 621913 at *5 (D.C. Cir. Oct. 29, 1996); *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996); *United States v. Bell*, 90 F.3d 318, 320-21 (8th Cir.), *cert. denied*, 116 S.Ct. 2581 (1996); *United States v. Wacker*, 72 F.3d 1453, 1475 (10th Cir. 1995), *cert. denied*, 117 S.Ct. 136 (1996); *United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995).

Carvell seeks to distinguish some of the circuit precedents by noting that his cultivation and use of marijuana was both wholly intrastate and entirely noncommercial. He stresses that the indictment pursuant to which he was prosecuted did not allege distribution, intent to distribute, or any other commercial activity. He acknowledges that Congress has made findings that the conduct enjoined by section 841 affects interstate commerce, but maintains that these findings do not relate to the act of merely growing marijuana for personal use.

This court rejected substantially the same arguments in *Smith*, holding that it “makes no difference” for purposes of Commerce Clause analysis that a defendant prosecuted under section 841 for manufacturing marijuana, conspiracy to manufacture marijuana and aiding and abetting the manufacture of marijuana “merely intended to use the marijuana for himself.” *Smith*, 920 F. Supp. at 248.

The government need not demonstrate a nexus to interstate commerce in every prosecution pursuant to section 841(a)(1). Instead, as reiterated by the Supreme Court in *Lopez*, ““where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.””

Id. (quoting *Lopez*, 115 S.Ct. at 1629, other citation omitted); *see also Leshuk*, 65 F.3d at 1112. In other words, for Commerce Clause purposes it matters not what Carvell did, so long as his conduct ran afoul of a general regulatory scheme that withstands Commerce Clause scrutiny.

Moreover, and contrary to Carvell’s contention, nothing in the Supreme Court’s *Wickard v. Filburn* decision, 317 U.S. 111 (1942), suggests a contrary result. In *Wickard*, the Court upheld the New Deal-era federal regulation of wheat production, as applied to wheat produced by a farmer entirely for consumption on his own farm. *Id.* at 114, 125-29. The Court noted that

even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what at some earlier time have been defined as ‘direct’ or ‘indirect.’

Id. at 125. Even though section 841 enjoins rather than limits production of the commodity in question, the same principle applies. Although, as Carvell points out, *Wickard* helps define the “outer limits” of regulation permissible under the Commerce Clause, *Lopez, supra*, the growing of marijuana for home use rather than for sale is entirely within those limits.

It therefore follows that Carvell cannot demonstrate the prejudice required by *Strickland*, and that his request for post-conviction review based on ineffective assistance of counsel must fail.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner’s motion to vacate, set aside or

correct his sentence be **DENIED** without an evidentiary hearing.¹

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of November, 1996.

*David M. Cohen
United States Magistrate Judge*

¹ Accordingly, Carvell's motion for appointment of counsel is denied as moot.